

PRACTITIONER'S CORNER

Collaborative Lawyering: A New Development in Conflict Resolution

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I. INTRODUCTION TO COLLABORATIVE LAWYERING

Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.¹

When Branch Rickey was about to hire Jackie Robinson as the first African-American baseball player in *major* league baseball, Rickey and Brooklyn Dodgers scout and manager Clyde Sukeforth spent an afternoon with Robinson explaining to him how very difficult it was going to be for him to play second base for the Brooklyn Dodgers.² Rickey told Robinson that he would be reviled, taunted, and insulted by the vilest racial epithets imaginable; that players and fans alike would try to drive him out of the league; that he would be spat upon, spiked by opposing players, and hit by opposing pitchers.³ But Rickey made Robinson promise that he would never retaliate. Robinson responded by saying that he would have thought that Rickey would want a player who's not afraid to fight back.⁴ No, replied Rickey, "I want a ballplayer with guts enough *not* to fight back!"⁵

This vignette is analogous to the difficulty in convincing today's litigating attorney that fighting back is not always a sign of strength, that it can in fact be a sign of inflexibility and harm the client's interests. A growing coterie of lawyers is stepping off from that presumption, and discovering that it is possible to take mediation advocacy a step further, by generally

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¹ WILLIAM SHAKESPEARE, *OTHELLO*, act 2, sc. 3.

² ARTHUR MANN, *THE JACKIE ROBINSON STORY* 110 (1950).

³ *Id.*

⁴ *Id.* at 111.

⁵ *Id.*

eliminating the need for a mediator through an innovative dispute resolution method known as "collaborative lawyering." The collaborative lawyering process has been developed by the Collaborative Law Center in Cincinnati, Ohio (CLC) and couples the problem solving and interest-based negotiation principles of mediation with an added commitment by the parties to settlement.⁶ This novel approach can be summarized succinctly as "representation for settlement purposes only" or "advocacy without litigation."

The heart of the collaborative lawyering process is the Participation Agreement, which each lawyer and client must sign at the outset of negotiations. In the Participation Agreement, the parties agree that each attorney's representation in the pending matter will be for settlement purposes only and that the parties can proceed to litigation only if they obtain new counsel. By contracting away their right to continue their respective relationships into litigation, both the attorneys and clients have increased the stakes in the negotiation process and make a real commitment to settlement. This increased incentive to achieve settlement is what sets collaborative lawyering apart from mediation.

The CLC is a group of 115 to 130 lawyers, from practices as diverse as large firms, corporate staff counsel, and solo practitioners, who are committed to finding non-adversarial alternatives to litigation and have signed the Application for Inclusion on Practice Roster.⁷ The CLC was founded in 1998, and is headed by its co-founder and president Robert W. Rack, Jr., Chief Circuit Mediator for the United States Sixth Circuit Court of Appeals. Bea V. Larsen, a matrimonial attorney in Cincinnati, is the other co-founder and CLC's vice-president and treasurer. Ms. Larsen also heads a subgroup of the Family Law Project, which applies the principles of collaborative lawyering to resolve matrimonial disputes.

Collaborative lawyering is especially well suited to the domestic relations context,⁸ in which children are often in the middle of the dispute,

⁶ CLC is located at 8 West Ninth Street, Cincinnati, Ohio 45202. For additional information or for a list of collaborative lawyers, telephone 513-956-0795, facsimile 513-721-3383, or at <http://www.collaborativelaw.com>.

⁷ Approximately seventy more lawyers have completed collaborative law training but have not yet signed the Application for Inclusion on General Practice Roster (General Legal Matters).

⁸ Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215, 221 (1999); see also D. Todd Sholar, Note, *Collaborative Law—A Method for the Madness*, 23 MEM. ST. U. L. REV. 667, 675–81 (1993) (one of the early journal notes to examine the use of collaborative law in domestic relations practice and to acknowledge the presence of ethical considerations in

and where the two parties wish to create and maintain a working relationship after the dispute is settled. However, other practice areas can also benefit from collaborative lawyering, and it is being practiced within the labor and employment bar. An employee may have a legitimate dispute with her employer, but she does not want to quit her job or create tension between herself and her employer. Similarly, the employer may have a desire to retain the employee if the narrow dispute can be resolved. Collaborative lawyering, in which the attorneys agree not to sue or threaten to sue, can help to achieve those goals.

The collaborative lawyering approach creates much less tension than other forms of conflict resolution because the possibility of litigation is entirely removed from the process and a meaningful commitment to settlement has already been made by the parties because they have signed the Participation Agreement. While critics may suggest that collaborative lawyers may agree upon a less desirable settlement simply to avoid having the process fail and foreclosing their ability to obtain attorney fees, proponents respond that the process itself creates an incentive to seek a better outcome for the client. Collaborative lawyering may not been seen as litigator-friendly; it will, however, prove to be client-friendly, and lawyers who are problem-solvers will better serve those clients.

Part II of this Article outlines the nuts and bolts of the collaborative lawyering process and reviews the Participation Agreement in more detail. Part III discusses the unique ethical considerations in the practice of collaborative lawyering and ethical issues that must still be settled. Finally, Part IV challenges tomorrow's lawyers to do a better job of incorporating collaborative processes into the every day practice of law and the creative resolution of disputes.

II. NUTS AND BOLTS OF COLLABORATIVE LAW

Comparing the collaborative lawyer's commitment to the settlement process to that of the litigator is like comparing the pig's commitment to his farmer's breakfast to that of the chicken, who survives to lay another egg.

Through the Participation Agreement, collaborative lawyering begins by making clear to the practitioner and the client that there is no reward for failure once the process has begun.⁹ If the collaborative law approach fails,

the collaborative lawyer's zealous representation of his client and the potential for having to withdraw from employment).

⁹ For a comprehensive exposition and defense of the cooperative strategy anticipating collaborative lawyering, see ROBERT H. MNOOKIN, ET.AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 319 (2000); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict*

the client must find new counsel *at a new law firm* to file or recommence the litigation. Having to find new counsel at a new firm if the process breaks down provides the client additional incentive to find the kinds of creative solutions necessary for a collaborative result. And, of course, the prospect of losing the client provides an incentive to the lawyer to find a solution to the dispute.¹⁰

Removing the possibility of going to trial at the outset of the process is a powerful architectonic way of changing the mindset of both the client and the attorney. Unlike mediation, where the attorney-client relationship will continue if the mediation fails, collaborative lawyering requires both attorneys to sign a non-litigation agreement from the outset. This helps the attorney to better, and more quickly, determine the real interests of his client. In addition, it forces the client to take a more positive approach to the possibility that the other side has a rational, legitimate interest in a mutual gains solution. As a result, both sides are able to see the process as a mutual gains experience, because they are working together, not independently, to find a solution.

Collaborative lawyering encourages four-way conferences, so that both clients and both attorneys can work collaboratively to identify their own interests, and legitimize the interests of the other side. Moreover, in collaborative lawyering, the probability that one side will threaten to "take the matter to court" is substantially lessened because of the cost that would result to both attorney and client.

The Participation Agreement governs the entire process. The Participation Agreement includes rules for discovery and, where necessary, joint court orders on such matters as staying pending litigation during the collaborative law settlement process.¹¹

Between Lawyers in Litigation, 94 COLUM. L. REV. 509, 513, 528, 551-54 (1994). *See also id.* at 535 ("[I]n order for lawyers to allow clients credibly to precommit to a cooperative solution the payoffs in the lawsuit must take the form of a prisoner's dilemma: mutual cooperation must have a bigger payoff for each player than mutual defection.").

¹⁰ The Participation Agreement does make an exception for in-house counsel. In-house counsel may continue to represent the corporate client, but the corporation agrees to secure different lead trial counsel if litigation ensues after the breakdown of the collaborative lawyering process. Respected members of the plaintiff's bar have accepted this apparent disparity of treatment provided plaintiff's counsel trusts in-house counsel not to abuse the exception by designing a failure of the process and the necessary elimination of the other side's attorney and firm from the case. *See discussion infra Part III.B.*

¹¹ *See, e.g.,* The Joint Motion To: (1) Stay This Case For ____ Days Pending the Parties' Collaborative Efforts to Settle Without Further Litigation; and (2) Denying All Pending Motions As Moot Without Prejudice to Refile (approved by Chief Judge Walter

A. *Commitment to Training*

Participation in collaborative lawyering brings a commitment to training. Attorneys who are members of CLC must complete an initial program of collaborative law training. The training incorporates basic interest-based negotiation skills¹² with role-playing exercises created by the Harvard Negotiation Project under the leadership of Professors Roger Fisher and currently Robert Mnookin.¹³ To that framework, CLC adds discussions on the purpose and application of the Participation Agreement, preparing the client for collaborative negotiation and on ethical and professional considerations for the practicing collaborative lawyer that are examined in Part III of this Article. When an attorney who is a CLC member agrees to participate in a collaborative law matter with a non-member attorney, the non-member agrees to “complete such training as is required by CLC for such non-member attorneys.”¹⁴

Membership in CLC and inclusion on the roster of collaborative lawyers are determined only by completion of prescribed initial training and refresher or advanced training, when scheduled, and execution of a Participation Agreement.

H. Rice of the U.S. District Court for the Southern District of Ohio on February 22, 1999), available at <http://www.ohsd.uscourts.gov/forms.htm>. The judges of the Court of Common Pleas for Hamilton County, Ohio adopted a similar Standing Order for cases within their jurisdiction. Effective October 1, 2001, the Court under the leadership of Judge Mark R. Schweikert and Judge Thomas C. Nurre approved an Entry adopting Local Rule 43 (Provisional) “in recognition of the possible benefits of Collaborative Law Settlement techniques and with the intention to examine and evaluate such efforts and their applicability to the cases filed in [our Court] . . .” The Court also proposed a Joint Motion to Treat Case Under Collaborative Law Rule with a Memorandum in Support and an Order Granting Joint Motion to Treat Case Under Collaborative Law Rule. HAMILTON COUNTY R. PRACTICE CT. C.P. 43, available at, http://www.courtclerk.org/com_rule.htm. Questions may be directed to Judge Schweikert via email at mschweik@cms.hamilton-co.org.

¹² See generally ROGER FISHER, ET. AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

¹³ The framework for teaching negotiation skills is crisply distilled in PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL, *NEGOTIATION PEDAGOGY: A RESEARCH SURVEY OF FOUR DISCIPLINES* (2000); see also BRUCE M. PATTON, *ON TEACHING NEGOTIATION*, PROGRAM ON NEGOTIATION WORKING PAPER 85-3 (1985); Bruce M. Patton, *Some Techniques For Teaching Negotiation to Large Groups*, 11 NEGOTIATION J. 403 (1995); Gerald R. Williams & Joseph M. Geis, *Negotiation Skills Training In The Law School Curriculum*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 113 (1998).

¹⁴ COLLABORATIVE LAW PARTICIPATION AGREEMENT FOR GENERAL LEGAL MATTERS 2 (COLLABORATIVE LAW CTR., INC., 1999) [hereinafter CLC PARTICIPATION AGREEMENT].

B. Good Faith Questions and Answers

By signing the Participation Agreement, both parties to the dispute agree to eschew formal discovery procedures, unless both parties later agree that formal discovery is needed. Instead, they pledge to "provide good faith responses to any good faith questions and requests."¹⁵ The Participation Agreement defines a good faith question as one that is "reasonably calculated to assist in assessing the merits and/or value of the party's claim(s) or to otherwise further the process of reaching a settlement of all issues."¹⁶ It is not inconceivable in this context that a collaborative lawyer might divulge information that would not be discoverable in litigation or that the lawyer might have wanted to avoid disclosing. If the information facilitates movement toward a mutual gains solution to the problem, divulging it may be wise for his client and therefore the attorney should attempt to gain his client's consent.¹⁷

For this reason, the Participation Agreement contains a confidentiality clause. No information disclosed in the collaborative lawyering process may later be disclosed in court if the process should break down. Experts or consultants retained during the process may not, absent agreement, participate in any subsequent litigation between the parties. The only exception to this rule would be if the information would later be needed to enforce an agreement or settlement reached through collaborative lawyering.

As in any settlement process, caution must be taken since some information revealed in failed collaborative settlement negotiations may be later obtained by a subsequently retained litigation attorney through formal discovery procedures. No process is immune from abuse and even collaborative lawyering under a Participation Agreement is not risk free if, despite the incentive to settle, a settlement is not obtained. Nevertheless, the potential benefit of obtaining a more satisfying outcome for the client outweighs the risk of not obtaining value for the cost of the collaborative lawyering process if the process fails. Moreover, as frequently occurs during mediation, a settlement not realized at the initial sessions may be worked out later, because the seeds have been sown early and are harvested later. The collaborative lawyers may be recalled after the litigation has commenced, because the clients later realize that a settled outcome is preferable to winning or losing at trial (after sinking more costs in the litigation).

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) cmt. (1999).

C. Court Intervention by Agreement Only

Neither party in a collaborative lawyering case may file a unilateral document or paper with the court regarding the matter in dispute. If either party deems it necessary to file any such document or paper with a court, absent agreement, the collaborative lawyering process is deemed to have failed, and the attorney *and his firm* shall be disqualified from further representing that client. The parties agree not to use the threat of litigation or the leverage of traditional pre-trial motion practice to try to get the upper hand; thus to file a document unilaterally with a court, even one seeking emergency relief, is considered a violation of the collaborative lawyering process.

If either of the parties requires a temporary agreement—a tolling agreement, for instance—the agreement will be put in writing and signed by both parties. If one or both parties withdraw from the process, this temporary agreement may be the basis for an order, which the court may make retroactive to the date of the written agreement. And any settlement reached through collaborative lawyering will be enforceable by a court if it becomes necessary.

D. Termination by Written Notice

Of course, sometimes collaborative lawyering will not succeed. However, through the Participation Agreement, the parties commit themselves to holding on to the very end for the possibility of a resolution without litigation. If one party wishes to terminate the process, he agrees not to do so unilaterally without having all parties first consult with an advisor/mediator approved by the CLC. This commitment to third party assistance is particularly valuable. A mediator may breach an impasse in which the most well-intentioned collaborative lawyers have found themselves. Fortunately, collaborative lawyers may reap greater benefits from mediation, because they are able to better serve as advocates in mediation partnering with the mediator to reach settlement.¹⁸ This last-chance effort is bypassed only if both parties agree that it would be fruitless.

In the event that one party does decide to withdraw from the collaborative law process unilaterally, he agrees to give prompt written notice to the other side. Following withdrawal, the parties agree to a thirty-

¹⁸ James K.L. Lawrence, *Mediation Advocacy: Partnering with the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425, 432 (2000) (examining the benefits of having the advocate in mediation work with the mediator to develop a facilitative process, brainstorm and evaluate options for settlement and craft a good substantive outcome).

day waiting period (unless emergency relief is needed) before proceeding with litigation. This gives both sides the opportunity to retain new counsel and educate that counsel about the case. Any temporary agreements made by the parties during the collaborative lawyering process will remain in force during this transition period.

E. Disqualification of the Attorneys

If an attorney or law firm is disqualified and continues to represent the client in subsequent litigation, the attorney or law firm has breached the Participation Agreement. Such a breach "would automatically entitle the opposing party to enforce the [Participation Agreement] in equity or by means of a motion to disqualify."¹⁹ There has been no litigation to date seeking to enforce a Participation Agreement. As a single exception, in-house counsel is not disqualified from continuing to participate in the action, "provided that in-house counsel shall retain outside counsel to represent the corporation as lead counsel in such action."²⁰

III. ETHICS AND COLLABORATIVE LAW

A. Ethical Orientation of the Collaborative Lawyer

Central to the American Bar Association (ABA) Model Rules of Professional Conduct is the fact that lawyers, by virtue of being lawyers, owe specific duties to specific parties, including clients, the legal profession, and society.²¹ Three of these duties are paramount: fiduciary duties, competence, and diligence. Traditional lawyers and lawyers who serve as neutrals share a commitment to these duties but may exercise these duties in drastically different ways. The traditional advocate is committed first and foremost to the interests of an individual: the client.²² By contrast, a neutral is not retained to advance the interest of a particular individual but rather to moderate or mediate a dispute, functioning as a sounding board off of which the parties can bounce their own ideas and generate their own creative solutions.²³ Projects such as the CLC invite attorneys to straddle the line

¹⁹ CLC PARTICIPATION AGREEMENT, *supra* note 14, at 4.

²⁰ *Id.*

²¹ MODEL RULES OF PROF'L CONDUCT pmbl. (1999).

²² *Id.*

²³ AMERICAN BAR ASSOCIATION, COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, REPORT WITH RECOMMENDATIONS TO THE HOUSE OF

between advocacy and neutrality, placing the collaborative lawyer in a unique ethical position. This distinctive ethical orientation of the collaborative lawyer may be best explained by describing the divergent responsibilities of the advocate and the neutral, in between which the collaborative lawyer practices.

An advocate's fiduciary duty to his client sets the tone for his duties of competence and diligence. "Fiduciary" may be defined as "a person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking."²⁴ A fiduciary must exhibit "scrupulous good faith and candor" at all times to the person with whom he is in a fiduciary relationship.²⁵ Among those who have fiduciary duties are executors, administrators, trustees, guardians, and lawyers.²⁶ Reflecting the principal importance of the lawyer-advocate's fiduciary duty is Model Rule 1.2, which provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."²⁷

The duties of competence and diligence are two further means by which a lawyer-advocate aims to fulfill his fiduciary duty to his client. Model Rules 1.1 and 1.3 are the essential guidelines of the lawyer's duties of competence and diligence. Model Rule 1.1 states, "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²⁸ Model Rule 1.3 provides, "a lawyer shall act with reasonable diligence and promptness in representing a client."²⁹ The Comment to Rule 1.3 cautions against procrastination and adds that "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."³⁰ The high standard of zealous advocacy demanded by the duties of competence and diligence ensures that the lawyer-advocate fortify his fiduciary relationship with his client.

DELEGATES R. 2.4 (Proposed Rule, 2001), *available at* http://www.abanet.org/cpr/e2k-report_hom.html.

²⁴ BLACK'S LAW DICTIONARY 431 (6th ed. 1991).

²⁵ *Id.*

²⁶ *Id.*

²⁷ MODEL RULES OF PROF'L CONDUCT R. 1.2 (1999).

²⁸ MODEL RULES OF PROF'L CONDUCT R. 1.1 (1999).

²⁹ MODEL RULES OF PROF'L CONDUCT R. 1.3 (1999).

³⁰ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (1999).

In light of the increasing use of ADR and the consequent shift in the role lawyers are called to play, the Ethics 2000 Commission of the ABA recently proposed the addition of Model Rule 2.4, which targets the unique responsibility of the lawyer-neutral. The rule defines the function of a lawyer-neutral:

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.³¹

Rule 2.4(b) then goes on to describe the specific ethical and professional duties of a lawyer-neutral:

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.³²

The language of Rule 2.4 reveals that the Commission is concerned about a party's perception of the lawyer-neutral's role:

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. . . . Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.³³

The explanation of the text stresses the magnitude of the risk of party misunderstanding: "The potential for confusion is sufficiently great to mandate this requirement in all cases involving unrepresented parties . . ."³⁴

The Model Standards of Conduct for Mediators (Standards), a joint project of the American Arbitration Association, the ABA, and the

³¹ MODEL RULES OF PROF'L CONDUCT R. 2.4 (Legislative Draft 2000).

³² MODEL RULES OF PROF'L CONDUCT R. 2.4(b) (Legislative Draft 2000).

³³ MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. (Legislative Draft 2000).

³⁴ MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. (Legislative Draft 2000).

Association for Conflict Resolution (ACR),³⁵ are designed to serve as a guide for the conduct of mediators, to inform the mediating parties, and to promote public confidence in mediation as a process for resolving disputes.³⁶ This ethical framework aims to combat concerns similar to those that motivated the creation of Model Rule 2.4. Two of the most notable provisions within the Standards are those dedicated to impartiality and quality of the mediation process.³⁷ These provisions reflect the fiduciary duty and duties of competence and diligence described above, but demonstrate that the foci of these duties are quite different in the context of lawyer neutrality.

The Standards provide that “[a] mediator shall mediate only those matters in which she or he can remain impartial and evenhanded.”³⁸ Furthermore, if at any time the mediator believes he is unable to continue the process in an impartial manner, he must withdraw from the case.³⁹ Thus, competency and diligence in lawyer neutrality require complete impartiality in all dealings with the mediating parties. This standard of impartiality differs notably from the definition of diligence in advocacy, which requires that the lawyer-advocate “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”⁴⁰

The Standards further define a quality process as one in which the mediator exhibits diligence and procedural fairness.⁴¹ The Comment following the Standards reveals the root of this requirement, stating that the role of a mediator “differs substantially from other professional-client relationships.”⁴² The Comment cautions that mixing the role of a mediator and a professional advisor is problematic, and therefore urges mediators to strive to distinguish between the two roles.⁴³ The Standards recommend that a mediator should at all times refrain from providing professional advice, and add that a mediator who at the request of the parties decides to take on an

³⁵ Before the Academy of Family Mediators, the Conflict Resolution Education Network, and the Society of Professionals in Dispute Resolution (SPIDR) merged in 2000 to create ACR, the project participant was SPIDR.

³⁶ AM. ARBITRATION ASS’N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, available at www.adr.org/rules/ethics/standard.html (last visited July 23, 2001). One need not be a lawyer to be a mediator. One can obtain certification, depending upon state rules, to become a professional mediator.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (1999).

⁴¹ AMERICAN ARBITRATION ASSOCIATION, *supra* note 36.

⁴² *Id.*

⁴³ *Id.*

additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other processes.⁴⁴ These ethical requirements are undoubtedly analogs to the duties of the lawyer-advocate discussed above, but certainly reveal that the means of achieving these duties in the context of lawyer neutrality are quite different. The interests and needs of an individual client are no longer the lawyer's sole motivation; the lawyer-neutral's chief cause is unbiased and open-minded guidance.

The divergent loyalties of the advocate and the neutral accentuate the unique circumstances faced by a collaborative lawyer who is also a practicing traditional advocate. Most of the attorneys involved in the CLC are employed by law firms or corporations, or work in private practice, and therefore earn their living by exhibiting the utmost respect and dedication to the needs and wishes of their clients. In the context of collaborative law, an individual client is no longer the lawyer's sole concern in the traditional sense. The duties of competence and diligence for the collaborative lawyer are expanded to encompass the interests of the neutral: open-minded counseling⁴⁵ and creative conflict resolution. Although the collaborative lawyer is not actually a neutral, his responsibilities shift away from those associated with "pure" advocacy and toward the creative, flexible representation that characterizes neutrality. A lawyer can become so comfortable with pushing the very specific agenda of his client, and only his client, that it can be difficult for him to shift perspectives toward a truly creative and truly collaborative mindset. Establishing roots within this unique ethical orientation should be a challenge every collaborative lawyer is prepared to face.

B. Specific Ethical Considerations

While the ethical implications of collaborative lawyering continue to be explored, the Participation Agreement has been tailored to conform to the Model Rules of Professional Conduct. Zealous representation requires a lawyer to act with "commitment and dedication to the interests of the client" and to carry to a conclusion, using "professional discretion in determining

⁴⁴ *Id.*

⁴⁵ See Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning To Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 125 (2000) (making a strong case for counseling along a broad spectrum of ADR options, but omitting collaborative lawyering as one of those options).

the means by which a matter should be pursued," any matter undertaken on the client's behalf.⁴⁶

Coming to the table with a mindset to settle the dispute without resort to litigation is not inconsistent with zealous advocacy, especially because the client has consented *in advance* to the attorney's singular pursuit of settlement without resort to litigation or the threat of litigation. Zealousness may be measured by utilizing the attorney's developed expertise in negotiation and problem solving rather than litigation.

A commitment to withdrawal if settlement efforts are unsuccessful is not inconsistent with carrying the client's interests to a conclusion. Under Disciplinary Rule 2-110(C)(5), the Model Code allows permissive withdrawal if "knowingly and freely" assented to by the client.⁴⁷ For the collaborative lawyer such assent occurs at the outset of the representation and is contained in the Participation Agreement.⁴⁸ Further, the client knows and consents *in advance* that "it will be necessary to select new attorneys and (pay) additional fees." The parameters of the representation have been defined, formalized and expressly agreed upon in the Participation Agreement.

Although many of the ethical concerns raised by collaborative law are addressed by obtaining prior written consent of the client in the Participation Agreement, the intricacies of the process leave some ethical questions unanswered. For instance, if the collaborative law process ends without a settlement, the collaborative lawyer is required to withdraw from representation of the client. The ethical rules require that a withdrawing attorney "take reasonable steps to avoid foreseeable prejudice to the rights of his client."⁴⁹ In many instances, this rule will require the withdrawing attorney not only to aid the client in finding new counsel, but to inform the successor counsel of the facts and circumstances that have developed in the case. However, the terms of the Participation Agreement may limit the

⁴⁶ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1999); *see* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(2); *see also* Sholar, *supra* note 8, at 677-80; Dominic G. Zerbi, Collaborative Law: Agreeing to Cooperate 29-31 (unpublished manuscript, on file with the author).

⁴⁷ *See also* MODEL RULES OF PROF'L CONDUCT R. 1.2(c), R. 1.16(b) (1999); Sholar, *supra* note 8, at 675-77.

⁴⁸ *Id.* Comment 4 to Model Rule 1.2(c) provides, "The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. . . . The terms upon which representation is undertaken may *exclude specific objectives or means*" (emphasis added); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. (1999).

⁴⁹ MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(A)(2); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (1999).

information that the collaborative lawyer can provide to new counsel and may restrict the collaborative lawyer's ability to aid in the case's transition to litigation. Without information and assistance from the collaborative lawyer, the litigating attorney may not adequately be able to enforce and protect the client's legal rights. Thus, the withdrawing attorney's obligations under the Participation Agreement and the ethical rules may come into conflict. Limited by the confidentiality and withdrawal provisions of the Agreement, collaborative attorneys may not be able to fulfill their obligations to withdraw without materially prejudicing their client's cause.

The practice of collaborative law also raises ethical issues regarding the division of fees between the attorneys that handle different stages of the case. As a general rule, lawyers may only split fees with other lawyers when the client has been informed, given consent, and the split is in proportion to the amount of work done and the responsibility assumed by each attorney.⁵⁰ Avoiding improper fee splitting could be difficult in cases where, for example, an attorney who has engaged a client on a contingent fee basis refers the case to a collaborative lawyer who successfully settles the matter in collaborative negotiations. In this scenario, it is unclear whether the collaborative lawyer is entitled to the contingent fee, or, if not, by what measure the collaborative lawyer is to be compensated. The new and imprecise nature of collaborative practice may make it difficult to assess the value of the services that the collaborative attorney provides. Consequently, the strict rules governing assessment of legal fees may pose ethical problems for collaborative lawyers.

Lawyers may also be unclear about their ethical obligations under the terms of the Participation Agreement itself. For example, the Agreement requires that the parties provide "good faith" answers in response to questions from the other party. However, the Agreement does not specifically address the parties' obligations to disclose relevant information that has not been affirmatively requested by the other side. Nor does the Agreement address whether collaborative lawyers have an obligation, independent of the obligations of their clients, to disclose all relevant information, or to otherwise act in a manner that ensures the integrity of the collaborative process.

Finally, the Agreement cannot prevent a signatory attorney and her client from entering the collaborative process with a pre-design for failure for the sole purpose of removing the irksome attorney on the other side or the firm—as well as herself and her firm—from the case. Such scheming is antithetical to the collaborative process. At a minimum, it tars the ill-scheming attorney

⁵⁰ See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107(A)(1)–DR 2-107(A)(3); MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(1)–R. 1.5(e)(3) (1999).

with a "scarlet letter" which will harm, if not destroy, her reputation as a lawyer worthy of trust in the future. A collaborative lawyer who has reason to be suspicious of the motives of a lawyer with whom she is planning to collaborate would be well-advised to have a candid discussion about her suspicions before signing the Participation Agreement.

IV. CARVING A PATH FOR COLLABORATIVE LAW

How can the legal system account for the developing role of the collaborative lawyer? I propose that both law schools and law firms formally recognize the increasing convergence of the roles of advocacy and problem solving in the legal profession.

First, and perhaps most important, law schools need to place increased emphasis on problem solving skills.⁵¹ From day one, fledgling lawyers are taught to advocate and persuade. Law school exams, moot court and trial team competitions, and the question-and-answer cycle that defines the Socratic method in the law school classroom all require that a student learn to pick a point and argue it persuasively until the end. The first year law student quickly learns that success in law school depends on being a competitive advocate—whether in the classroom, on paper, or in extracurricular activities. If law schools were to provide more opportunities for students to feel comfortable with and actually to admire problem solving, students would learn to appreciate its unique features and feel comfortable with its distinct ethical responsibilities. This could be in the form of mandatory courses in ADR for first year students, or simply a wider variety of courses for upper-level students to study ADR, including clinics and seminars on creative counseling, problem solving and ADR options, including collaborative lawyering.⁵²

⁵¹ While many law schools have improved the instruction they offer in ADR, the majority of courses and clinics focus on traditional advocacy issues and techniques. See Kimberlee K. Kovach, *ADR Education: The Promise of Our Future*, DISP. RESOL. J., Apr.–Sept. 1996, at 56, 58–59; see generally Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001) (examining the differences in the roles of lawyer as advocate, versus lawyer as mediator).

⁵² See Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 5 (1996) (stating that the American legal education is "weak" in teaching practical skills such as dispute resolution techniques). See generally AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 138–51, 185–90, 242–45 (1992) (discussing problem-solving techniques, such as negotiation).

Second, many law firms subsume their ADR practice within the practice of various departments. By contrast, a growing number of firms have distinct ADR practice groups. One such firm is Kaufman and Canoles in Norfolk, Virginia, which describes the reason for establishing a separate ADR practice group:

In order to be competitive themselves, providers of legal and other professional services must respond to [the] need of their business clients [to find cheaper and faster ways to do business]. One way [we] are meeting this challenge is by providing state of the art advice to clients on alternative dispute resolution.⁵³

This reasoning demonstrates the firm's commitment to treat ADR as its own discipline. The creation of distinct ADR practice groups—which could, of course, be composed of interested and qualified members of other practice groups—would be a means for full-service law firms to acknowledge and actively integrate the reality of ADR into their legal practice. Those lawyers who identify themselves as ADR attorneys—and not simply as advocates who at times resort to ADR—will come to appreciate the features that distinguish ADR—and particularly collaborative lawyering—from other forms of law practice, particularly ethical duties. Establishing an ADR practice group will also encourage other attorneys within the firm who rarely utilize ADR to make the same distinction in their own minds.

Third, law firms could require that all attorneys in any practice group who utilize ADR to any extent in their practice periodically attend a seminar or Continuing Legal Education program on ethics in collaborative problem-solving. This would serve to highlight the ethical and professional differences between advocacy and problem solving, which their attorneys might not otherwise consider. While the differences are clear when they are analyzed in an article such as this one, they may not be so obvious to legal practitioners who get caught up in the routine of day-to-day practice without thinking more seriously about the varying roles they play as modern lawyers.

⁵³ Kaufman & Canoles, *Practice Areas*, available at <http://www.kaufcan.com/PracticeDetail.asp?PACode=2> (last visited July 23, 2001); see also Robert E. Meade, Circuit City: *Green Light for Employee Arbitration Plans?*, THE ADR ADVISOR, Summer 2001, at 1, available at http://www.stradley.com/admin/Resources/resacrobat/20010817112245_FILE_NAME.pdf (newsletter of Stradley Ronan Stevens & Young, LLP; the newsletter is devoted to publishing articles relative to the application of dispute resolution techniques to business disputes).

Finally, lawyers, judges, and academics committed to problem-solving⁵⁴ could ascend the dais and educate the bar *and potential disputants* about the benefits of early settlement initiatives, including collaborative lawyering. Speeches and discussion groups are opportunities to sow the value-seeds of collaborative negotiation and resolution of disputes without resort to expensive litigation to a public craving such knowledge. Fears that attorney fees will be duplicative and will necessarily increase, that the other side will necessarily take advantage of our openness and disclosure of information or that the other side will not negotiate in good faith will be reduced and put into a broader and more useful context through public dialogue.⁵⁵

V. CONCLUSION

Alternative dispute resolution is not a new idea. Many jurisdictions require cases to go to a mediator before a judge will hear them. But for ADR to be successful in any guise, it must be practiced by lawyers and clients, who are convinced not just of the merits of their case, but of the merits of finding a successful resolution to a dispute without formal (and expensive) litigation. Collaborative lawyering can only be successful when the parties in dispute, and their attorneys, have changed their minds about the process, and about the definition of success. The process can be civil—and the outcome positive—if both sides in the dispute validate the legitimacy and rationality of the other, and if both sides recognize that when the dispute is resolved, they can *both* be better off than *either* would have been in litigation. Collaborative lawyering will not work for every case. But it *can* work for many. It is an experiment in problem-solving that should be endorsed by lawyers who take pride in caring about the broader business and personal interests of their clients. Critics will say that the lawyer is taking a significant risk of lost litigation fees and a client lost to a litigation firm. It is, however, the client whom we zealously serve, and it is the client who may significantly benefit from a creative settlement through collaborative lawyering. A

⁵⁴ William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 374, 389 (1999). Coyne presages use of settlement counsel as a giant step toward collaborative lawyering, "The attorney is paid to explore settlement, knowing that another attorney will handle the case if efforts to reach a negotiated solution are unsuccessful." *Id.* at 392.

⁵⁵ *Id.* at 408–12. Coyne's cost-benefit analysis for use of separate settlement counsel nearly mirrors the reasons for using collaborative lawyers. On using separate settlement counsel, Roger Fisher is often credited with advancing the idea. See Roger Fisher, *He Who Pays the Piper*, HARV. BUS. REV., Mar.–Apr. 1985, at 150, 155–57.

negotiator—and collaborative problem-solver—is successful “not by having a path through the woods but in knowing the terrain.”⁵⁶

⁵⁶ With appreciation to Professor Roger Fisher, Samuel Williston Professor of Law, Emeritus, and Director Emeritus of The Harvard Negotiation Project, paraphrased from Videotape: The Hackerstar Negotiation (Harvard Negotiation Project 1985) (on file with the Program on Negotiation at the Harvard Law School).